Exhibit 2

BEFORE THE
NEW YORK PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission to Examine Methods by Which Competitive Local Exchange Carriers Can Obtain and Combine Unbundled Network Elements	)	Case 98-C-0690
Joint Complaint of AT&T Communications of New York Inc., MCI Telecommunications Corporation, WorldCom, Inc. d/b/a LDDS WorldCom and the Empire Association of Long Distance Telephone Companies, Inc. Against New York Telephone Company Concerning Wholesale Provisioning of Local Exchange Service by New York Telephone Company and Sections of New York Telephone's Tariff No. 900	)	Case 95-C-0657
Proceeding on Motion of the Commission to Examine Issues Related to the Continuing Provision of Universal Service and to Develop a Regulatory Framework for the Transition to Competition in the Local Exchange Market	)	Case 94-C-0095
Proceeding on Motion of the Commission Regarding Comparably Efficient Interconnection Arrangements for Residential and Business Links	)	Case 91-C-1174

JOINT PETITION OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, E.SPIRE COMMUNICATIONS, INC. AND INTERMEDIA COMMUNICATIONS INC. FOR REHEARING OF THE COMMISSION'S MARCH 24, 1999, ORDER DIRECTING TARIFF REVISIONS

Pursuant to N.Y. Public Service Law § 22, the Association for Local Telecommunication Services ("ALTS"), e.spire Communications, Inc. ("e.spire") and Intermedia Communications Inc. ("Intermedia"), (collectively the "Joint Parties"), by counsel, hereby submit this Joint Petition for Rehearing of the Commission's March 24, 1999, Order Directing

Tariff Revisions ("Order"). As set forth below, rehearing of this Order is warranted because the Commission's Order rests upon errors of law, including the failure reflect the decision of the Supreme Court in *AT&T v. Iowa Util. Bd.*[1]

I. INTRODUCTION AND SUMMARY

On July 23, 1998, Bell Atlantic-New York ("BANY"), in an attempt to fulfill its April 6, 1998, Pre-filing Statement, filed proposed amendments to its P.S.C. No. 916 Telephone tariff to implement the expanded extended link ("EEL")[2] offering. Following a series of collaborative meetings, technical conferences, and comment by a number of parties, the Commission, on March 24, 1999, issued its Order. The Commission's Order is intended to produce an EEL product that would "facilitate local exchange competition, particularly to residential and smaller business customers."[3] At the same time, another goal of the Commission in its Order was to ensure that the EEL does not become a "low priced substitute for special access and private line services." In furtherance of this goal, the Commission imposed several illegal and unworkable restrictions on the use of EELs. Specifically, the Commission ordered:

- that EELs above the DS1 level be connected to a CLEC switch that handles local exchange traffic and
- that EELs above the DS1 level be used "primarily to transmit local exchange traffic.

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1 119 S.Ct. 721 (1999).

2 An EEL consists of the local loop, local transport and, where required, multiplexing.

3 *See* Order at 5.

The restrictions on EELs imposed by the Commission not only violate Sections 251 and 271 of the Telecommunications Act[4] and the orders of the FCC, but the restrictions will also result in a largely useless EEL product that will certainly not provide the facilities-based local exchange competition that the Commission seeks to promote in New York. The only rationale offered by the Commission for imposing restrictions on the EEL is to preserve BANY's special access revenue stream.[5] However, the restrictions on EELs contained in the Order are patently unlawful and will not withstand review for the following reasons:

- BANY's proposed restrictions on the EEL, ultimately adopted by the Commission in the Order, were rooted in a holding of the Eighth Circuit Court of Appeals that has been vacated by the Supreme Court in *AT&T v. Iowa Util. Bd.*[6]

- Under Section 271, BANY must offer CLECs nondiscriminatory access to the local loop and local transport. The restrictions on EELs sought by BANY and sanctioned by the Commission contravene Section 271(c)(2)(b), as well as BANY's obligation to provide nondiscriminatory access to unbundled network elements;

- The FCC's rules prohibit ILECs from imposing any restrictions on the use of UNEs;

- The decision in *AT&T v. Iowa Util. Bd.* precludes BANY from separating already-combined network elements before leasing them to CLECs;

- Section 706 of the Act has been interpreted by the FCC to require ILECs to make UNEs available for the provision of advanced telecommunications services, including data services, on a nondiscriminatory basis; and

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4 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* (the "Act"). *See* 47 U.S.C. §§ 251, 271.

5 *See* Order at 5. ("The EEL was not intended...as a low priced substitute for special access and private line services which are already competitive. Staff Proposal 1 achieves these objectives efficiently. It requires simply that EELs with 'high capacity' local loops (of DS-1 level and above) be connected to a CLEC switch that handles local traffic, and that such EELs be used to transmit primarily local exchange traffic.")

6 119 S.Ct. 721 (1999) (*"AT&T v. Iowa Util. Bd."*).

- BANY provides EELs free of the restrictions imposed by the Commission to the nation's largest communications company and to itself. Allowing BANY to refuse to provision EELs to CLECs clearly results in unlawful discrimination.

For all these reasons, the Commission should revise its Order upon rehearing, and remove the unlawful restrictions placed upon EELs. Allowing such restrictions to remain in place will only ensure that BANY will remain out of compliance with Sections 251 and 271 of the Act, and that robust competition for all services will be artificially hindered in New York.

II. UNDER THE COMMUNICATIONS ACT AND THE FCC's RULES, THE COMMISSION CANNOT LAWFULLY RESTRICT THE USE OF UNEs

Ever since filing its April 6, 1998, Pre-filing Statement, BANY has contended that the EEL is a voluntary offering of a combination of elements, subject to restriction for the provision of switched local exchange and associated switched exchange access services. While the Commission ultimately rejected BANY's effort to characterize the EEL offering as a purely voluntary one in its Tariff language,[7] by adopting the restrictions contained in the Order, the Commission has tacitly endorsed the rationale underlying BANY's characterization of the EEL as a voluntary offering capable of being restricted. Other than its desire to prevent the EEL from cannibalizing BANY's special access and private line service revenues, the Commission has failed to provide any legal justification for the EEL restrictions contained in its Order.[8]

The Commission appears to have based its conclusion that EELs are subject to use restrictions on the flawed legal analysis put forth by BANY. BANY's justification for restricting the EEL is that the EEL is a purely voluntary offering of a combination of elements,

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7 Case 98-C-0690, *et al.*, *Order Suspending Tariff Amendments and Directing Revisions* at 5 (Jan. 11, 1999).

8 *See* Order at 5.

and therefore subject to restrictions. However, the legal authority underpinning BANY's analysis was recently overturned by the Supreme Court.

BANY's legal justification for EEL restrictions, subsequently adopted in the Order, was recently rejected by the Supreme Court in its decision in *AT&T v. Iowa Util. Bd.*.[9] The Supreme Court's decision overturned many of the holdings of the Eighth Circuit Court Appeals decision in *Iowa Util. Bd. v. FCC*,[10] including the Eighth Circuit's determination that FCC Rule 315(b), which forbids ILECs from separating UNEs before leasing them to competitors, was beyond the scope of what the Act requires.[11] BANY pointed to the Eighth Circuit's decision on this point to argue that the EEL is comprised of separate elements which BANY cannot be compelled to recombine. The Supreme Court's decision obviated the faulty reasoning underlying BANY's, and the Commission's, restrictions on the EEL. The Supreme Court held that the FCC's promulgation of Rule 315(b), "aimed at preventing ILECs from 'disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants" was an "entirely rational" implementation of Section 251(c)(3)'s nondiscrimination requirement.[12]

BANY and the Commission have both failed to provide any justification for placing service restrictions on the EEL. The Supreme Court's holding, along with the FCC's orders (as set forth below) make clear that the EEL is not a voluntary offering which can be

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9 119 S.Ct. 721 (1999).

10 *See* 120 F.3d 753, 813 (1997).

11 See 47 C.F.R § 51.315(b).

12 *AT&T v. Iowa Util. Bd.*

restricted in any fashion. To the contrary, the FCC has made abundantly clear that the use of the UNEs comprising the EEL may not be restricted in any way.

A. The Commission Cannot Limit CLEC Use of UNEs

The restrictions on EELs contained in the Commission's Order contravene not only the conclusions reached in the Supreme Court's recent decision, but also a number of conclusions reached by the FCC in its *Local Competition Order* that make clear that service based restrictions violate the Communications Act.[13] Specifically, the FCC's *Local Competition Order* expressly rejected the imposition of any "local service requirement" upon CLECs seeking interconnection. The FCC stated:

> We conclude that the phrase "telephone exchange service and exchange access" imposes at least three obligations on incumbent LECs: an incumbent must provide interconnection for purposes of transmitting and routing telephone exchange traffic or exchange access traffic or both. . . . Congress made clear that incumbent LECs must provide interconnection to carriers that seek to offer telephone exchange service *and* to carriers that seek to offer exchange access.
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> We also conclude that requiring new entrants to make available both local exchange service and exchange access as a prerequisite to obtaining interconnection to the incumbent LEC's network under subsection (c)(2) would unduly restrict potential competitors. For example, CAPs often enter the telecommunications market as exchange access providers prior to offering telephone exchange services. . . . We see no convincing justification for treating providers of exchange access services that offer telephone exchange services differently from access providers who do not offer telephone exchange

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13 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Memorandum Opinion and Order, 11 FCC Rcd 15499, ¶ 184 (1996) ("*Local Competition Order*") (*emphasis in original*).

services. We therefore conclude that parties offering only exchange access are permitted to seek interconnection pursuant to section 251(c)(2).[14]

The FCC's determination clearly stands for the proposition that artificial service requirements cannot be imposed on CLECs. The March 24, 1999, Order, however, limits a CLEC's use of EELs to the transmission of "primarily local" traffic in direct contravention of the FCC's rules. Putting aside the fact that to date the Commission has not clarified precisely how, or even whether, it is technically feasible to enforce a "primarily local" restriction, it is very clear that such a restriction cannot stand in light of the FCC's rules.

B. Neither the Communications Act Nor the FCC's Rules Permit Any Restrictions on a CLEC's Ability to Use UNEs

The FCC's rules make clear that UNEs are available to CLECs for the provision of any "telecommunications service." The FCC's rules, specifically, 47 C.F.R. § 51.309(a), states that "[a]n incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in a manner that the requesting telecommunications carrier intends." Section 153(46) of the Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities used.*"[15]

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14 *Id.* at ¶ 185.

15 *See* 47 U.S.C. § 153(46) (*emphasis added*).

The restrictions adopted by the Commission in its Order restricting EELs to the transmission of local exchange traffic at speeds below DS-1 obviously contravene the FCC's rules and the Act. The FCC's rules unequivocally state that "the only limitation that the statute imposes on the definition of a network element is that it must be 'used in the provision of a telecommunications service.'"[16] Indeed, any restriction that would prevent a CLEC from using EELs, other UNEs (with the exception of unbundled switching)[17] or other combinations of UNEs unless they provide local dialtone would effectively prevent CLECs from using such UNEs to provide the most important data-oriented services that are now becoming available, as described further below. Such a result must be rejected by this Commission.

III. A RESTRICTED EEL PRECLUDES BANY COMPLIANCE WITH SECTION 271

The competitive checklist items set forth in Section 271 of the Act were passed into law by Congress as the bare bones requirements that RBOCs must meet in order to obtain

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16 *Local Competition Order* at ¶ 261 (citations omitted).

17 In its *Local Competition Reconsideration Order*, the FCC addressed whether an IXC could use an unbundled local switching UNE solely to terminate its long distance traffic. The FCC found that such an arrangement would not be practical, because the local switch port is needed to provide both local and interexchange service, and use of that switch port to provide only long distance service would mean that the customer could not receive local calling service. The FCC found that "as a practical matter, a carrier that purchases an unbundled switching element will not be able to provide solely interexchange service or solely access service to an interexchange carrier. A requesting carrier that purchases an unbundled local switching element for an end user may not use that switching element to provide interexchange service to end users for whom that requesting carrier does not also provide local exchange service."

in-region interLATA authority. As the national minimum standard, the checklist items are not subject to negotiation or compromise by anyone, including the Commission.

Among the items required by the competitive checklist set forth in Section 271(c)(2)(B) are the provision of nondiscriminatory access to the local loop and local transport. The restrictions in the Order sanction BANY's discriminatory provision of access to loop and transport elements. The net result is that BANY is effectively precluded from complying with Section 271 of the Act.

IV. BY INHIBITING THE DEPLOYMENT OF LOW COST, HIGH BANDWIDTH ACCESS TO THE INTERNET, RESTRICTIONS ON THE EEL VIOLATE SECTION 706 OF THE ACT AND PUBLIC POLICY

In its *706 Order*, the FCC found that the Act is technology neutral. The FCC unequivocally stated that the procompetitive provisions of the Act, including section 706:

> [A]pply equally to advanced services and to circuit-switched voice services. Congress made clear that the 1996 Act is technologically neutral and is designed to ensure competition in all telecommunications markets. We therefore conclude that incumbent LECs are subject to section 251(c) in their provision of advanced services. Specifically, we find that incumbent LECs are subject to the interconnection obligations of section 251(a) and 251(c)(2) with respect to their circuit-switched and packet-switched networks.[18]

BANY's existing restrictions foreclose the provision of data services over EELs, and this discrimination against data service providers contradicts that Act, the FCC's interpretation of the Act, and sound public policy.

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[18] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 98-188, Memorandum Opinion and Order and Notice of Proposed Rulemaking at ¶ 11 (1998) ("*706 Order*").

The FCC's *706 Order* addressed two types of potential ILEC discrimination: (1) discrimination by the ILEC in its provision of xDSL loops to itself; and (2) discrimination by the ILEC regarding the terms and conditions of the availability of loops for circuit-switched and packet-switched services. As the FCC noted in the *706 Order*, "if we are to promote the deployment of advanced telecommunications capability to all Americans, competitive LECs must be able to obtain access to incumbent LEC xDSL-capable loops on an unbundled and nondiscriminatory basis."[19] The local service restrictions placed on the EEL by BANY clearly discriminate against data service providers, and must therefore be rejected.

Some CLEC business plans focus on the provisioning of data services to customers that do not involve traditional voice services, and other CLECs provide local exchange and exchange access – including data services – over the same facilities. The Order's restrictions on the EEL will limit the ability of innovative telecommunications service providers to offer consumers new bundles of service. In addition, the restrictions proposed by BANY favor circuit-switched providers over providers that use packet-switching technology. Not only does this violate the technology-neutral underpinnings of the Act, but it risks permitting a regulatory regime – rather than consumer demand – to drive the technology choices of telecommunications service providers in New York. As such, in addition to violating the Act, the EEL restrictions adopted by the Commission violate sound public policy.

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19 *Id.* at ¶ 40.

V. BANY's USE OF EEL AND ITS PROVISION OF EELs TO AT&T DISCRIMINATES AGAINST OTHER CLECs

BANY presently uses EELs to provision a variety of data services to its retail customers. The restrictions imposed by the Commission on the EEL foreclose CLECs from providing these same service to their customers. BANY provisions DSL services – in the form of T1 service over HDSL – and other data services (*e.g.*, frame relay and ATM) to itself using EEL arrangements.[20] In provisioning these data services, BANY utilizes loops, transport, and, when necessary, multiplexing to connect the data circuit to a frame relay or ATM network. These data circuits are the functional equivalent of EELs, and therefore, the restrictions placed by BANY on the EEL unlawfully discriminate against CLECs in their effort to provision these same advanced services to consumers.

Moreover, BANY is providing unrestricted DS1-level EELs to AT&T pursuant to the Dedicated Transport provision of the BANY/AT&T interconnection agreement. Under this agreement, Dedicated Transport is defined as

> an interoffice transmission path between designated locations to which a single carrier is granted exclusive use. Such locations may included NYNEX central offices or other equipment locations, AT&T network components, or *Customer premises*....[21]

This definition of dedicated transport is functionally identical to the EEL, and pursuant to this provision, BANY is converting AT&T special access circuits to Dedicated Transport UNEs, the

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20 In a recent FCC filing, attached hereto as Exhibit A, Bell Atlantic indicated that it intends to provide a wholesale DSL product to America On Line, and eventually, Bell Atlantic will offer a wholesale DSL product region-wide.

21 BANY/AT&T Interconnection Agreement at § 2.9.5.2.

rates of which have been set at TELRIC by the Commission. BANY refuses to provide EELs to other carriers according to these same terms and conditions. Moreover, BANY has flatly rejected efforts of Intermedia to opt-into the Dedicated Transport of the BANY/AT&T interconnection agreement.[22] The net result is that BANY is using this interconnection agreement to favor AT&T at the expense of other competitors.

The Act does not stand for the proposition that BANY can discriminate in its own favor – or in favor of the nation's largest communications company – in the provision of UNEs, including EELs. To counteract this unlawful discrimination, the Joint Parties submit that the Commission should remove all restrictions on the EEL immediately.[23]

VI. AT A MINIMUM, THE COMMISSION SHOULD CLARIFY THAT EELS THAT TERMINATE INTO SWITCHES CAPABLE OF LOCAL CALL COMPLETION SATISFY THE "PRIMARILY LOCAL" STANDARD

While the Joint Parties submit the Commission should reconsider – in its entirety – its Order permitting restrictions on the EEL, the Commission should, at a minimum, clarify that EELs that terminate into switches capable of local call or local data link connection completion meet the "primarily local" standard. Under BANY's existing tariff, "EEL arrangements with DS1 and DS3 Links must be used to transmit primarily (greater than 50%)

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22 See February 23, 1999, letter from Jeffrey A. Masoner, Vice President, Bell Atlantic Network Services, to Jonathan E. Canis, attached hereto as Exhibit B, denying Intermedia's request to adopt the Dedicated Transport provision of the BANY/AT&T Interconnection Agreement.

23 In the event that the Commission denies this Petition for Rehearing, one or all of the Joint Parties will seek immediate relief from BANY's discriminatory behavior.

local exchange service."[24] As drafted by BANY, measuring whether an EEL is used primarily for local exchange service is essentially impossible.

When a CLEC receives an EEL dedicated transport facility, it typically splits the transmission at a collocation cage, sending some traffic to a data switch and some traffic to a traditional voice switch. While both packet and circuit switches have the capability of completing local calls, it is essentially impossible to measure the minutes of use to determine whether a circuit meets the "primarily local" test. To resolve this measurement difficulty, the Commission should clarify that as long as an EEL is connected to a switch capable of local call completion – which excludes long distance POPs, then the "primarily local" test is satisfied.

In the alternative, the Commission should clarify that if more than 50% of the channels utilized on a DS1 or DS3 loop carry at least some local traffic, then the DS1 or DS3 loop will satisfy the "primarily local" standard. In a typical DS1, 24 channels exists, and CLECs provide both voice and data services over separate channels. As such, these DS1s are not used to provide dedicated long distance service, rather they are used to provide local POTS, interexchange, and data services, typically to small business service. Thus, in keeping with the Commission's goal of using the EEL to bring competition to the small business market, the Commission should permit CLECs to use EELs in cases where at least 50% of the channels carry at least some local traffic.

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[24] P.S.C. No. 916 – Telephone § 5.14.2.12.

VII. CONCLUSION

For the foregoing reasons, the Joint Parties submit that the Commission should reconsider its March 24, 1999 EEL Order consistent with the Comments presented herein.

Respectfully submitted,

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